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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 ELSIE I. LYBECKER, a
9 single woman,
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11 Plaintiff,
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13 vs.
14 UNION PACIFIC
CORPORATION,
15
16 Defendants.

NO. CV-13-0231-LRS

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

17 **BEFORE THE COURT** are the following cross-motions:
18 Defendant Union Pacific Corp.'s ("Union Pacific") Motion for
19 Summary Judgment (ECF No. 46); and Plaintiff's Motion for
20 Summary Judgment (ECF No. 50). A telephonic hearing was
21 held on December 4, 2014. Jaime Cole and Thomas Christina
22 participated on behalf of the Defendant Union Pacific;
23 Arthur Bistline and Mark Ellingsen participated on behalf of
24 Plaintiff Lybecker. At the close of the hearing, the Court
25 took the cross-motions under advisement. The Court has
26 considered the oral and written arguments of counsel.

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I. Undisputed Material Facts

Plaintiff brought this action under the Federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. Plaintiff's claim is based solely on the statutory penalty provision she asserts against Union Pacific under ERISA §502(c)(1)(B), 29 U.S.C. §1132(c)(1)(B).

Daniel J. Angel ("Angel"), was an employee of Defendant Union Pacific Railroad Company. Prior to 2004, Angel had been married and divorced twice. Prior to 2002 and during all material times thereafter, Angel had four children, two who were biological children (Clayton and Natasha) and two who were adopted children (Roger and Kevin). During the period beginning in 2002 and through at least 2014, both of Angel's former wives were living. Prior to and at the time he went missing, Plaintiff and Angel had a relationship and maintained a residence together in Spokane, although Angel had moved out about six months before his disappearance.

On January 1, 2002, and for a considerable period before that date, Angel was eligible to contribute to the Union Pacific Corporation Thrift Plan ("Thrift Plan"). On September 28, 2002, Angel named Plaintiff the sole death beneficiary of any undistributed portion of his Thrift Plan account. On May 31, 2004, and for a considerable period before that date, Angel was eligible to elect to participate in a variety of welfare benefit plans subject to ERISA under the Flexible Benefits Program for Full Time Salaried and

1 Full-Time Hourly Employees of Union Pacific. One of these
2 welfare benefit plans was the Life and Accident Insurance
3 Program (the "subject plan"), and coverage was issued and
4 administered by Prudential Insurance Company of America
5 ("Prudential").¹ A benefit of participating in the subject
6 plan was the ability of the participant to secure an
7 insurer's promise to make a payment on account of the
8 participant's death while covered under the plan, and the
9 right of the participant to name the payee at any time
10 before death.

11 All aspects of claims administration under the subject
12 plan were handled exclusively by Prudential. At the time
13 specified for distribution of the death benefit, the person
14 most recently named to receive the life insurance policy
15 proceeds receives the proceeds. A change of death
16 beneficiary was effective as of the date it was signed if
17 and only if it was made on a form created by Prudential and
18 Prudential receives the signed form.

19 On May 31, 2004 Angel named Plaintiff as the
20 beneficiary under the Life Insurance Plan, on a Prudential
21 form. Angel had elected to participate in the Life
22 Insurance Plan and the amount of Angel's basic and
23 supplemental life coverage was \$481,000.00. Angel's basic
24 and supplemental Accidental Death coverage was \$567,000.00.
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27 ¹Defendant Prudential was dismissed on February 28,
2014. ECF No. 44.

1 On November 14, 2004, Angel's boat was found drifting
2 on Lake Pend Orielle in Idaho with no one on board. On
3 November 15, 2004, Kootenai County Sheriff's Department
4 interviewed Plaintiff during the course of the
5 investigation. Plaintiff testified that the investigator
6 told her it would take seven (7) years to obtain a death
7 certificate in Idaho. She apparently did not question the
8 accuracy of this information.

9 On November 16, 2004, the Sheriff's Department placed
10 its investigation into Angel's disappearance on the inactive
11 list and registered Angel as a missing adult on the NCIC
12 database until the fall of 2012.

13 At all times surrounding the events underlying this
14 action, i.e., after November 14, 2004, Union Pacific's Human
15 Resources Department had a Human Resources Service Center
16 ("the Service Center"). Employees of the Service Center had
17 access to information regarding the identity of death
18 beneficiaries, if any, of the Thrift Plan. Employees of the
19 Service Center, however, did not have access to information
20 regarding the identity of the death beneficiaries, if any,
21 of the Group Life/AD&D Plan.²

22 If a Union Pacific employee's Thrift Plan beneficiary
23 did not contact the Service Center with regard to an
24 employee who had been reported deceased by the employee's
25 coworker, supervisor, or family member, the practice of the
26

27 ²ECF No. 65 at 19-20.

1 Service Center employees was to contact the beneficiary. The
2 purpose of the contact was to inform the beneficiary that he
3 or she was the death beneficiary of the employee's Thrift
4 Plan account.

5 On December 16, 2004, Union Pacific wrote to Plaintiff
6 indicating that she was the beneficiary of Angel's Thrift
7 Plan, but that to process the account, she needed a death
8 certificate. Plaintiff contends that Union Pacific did not
9 inform her that she was the beneficiary of Angel's life
10 insurance policy nor that Prudential was the insurance
11 company that provided the life insurance policy. Union
12 Pacific notes that only Prudential had information about
13 death beneficiaries of life/AD&D coverages, because
14 beneficiary designation forms and beneficiary designation
15 change forms were effective only if received by Prudential
16 and employees were not required to send these forms to
17 Prudential through Union Pacific.

18 According to Plaintiff, after Angel's disappearance,
19 Prudential refused to inform Lybecker of the identity of the
20 beneficiary of Angel's life insurance policy because no
21 death certificate had been issued for Angel.³

22 In 2009, a Union Pacific employee Mary Estrada spoke
23 with Plaintiff by telephone about the letter she (Mary
24

25 ³ECF No. 48-7, Cole Declaration, Exhibit G (copy of a
26 letter dated March 25, 2013, from Plaintiff's counsel to
27 Prudential.

1 Estrada) had sent to Plaintiff dated September 18, 2009.
2 This letter was written to inquire why Plaintiff had not
3 applied for a distribution of Angel's Thrift Plan Account.
4 Plaintiff told Mary Estrada that she could not get a death
5 certificate until seven years after Angel's disappearance.
6 Plaintiff testified that Union Pacific called her each year
7 about Angel's Thrift Plan account "[b]ecause I was the
8 executor of the estate."

9 Plaintiff states she called Union Pacific, although the
10 dates are not certain, to discuss the 2009 correspondence.
11 Plaintiff states Shawna Smith from Union Pacific would not
12 disclose any information, though, because there was no death
13 certificate.

14 It is undisputed that Plaintiff did not make any
15 written request to Union Pacific for information or
16 documents relating to the subject plan until after she
17 obtained counsel in the fall of 2012. ECF No. 65 at 21. The
18 record provides that Plaintiff allegedly made two oral
19 requests, however, in November and December 2004.

20 On June 14, 2012, Plaintiff filed a Petition in the
21 District Court for the First Judicial of Idaho (In the
22 Matter of Daniel James Angel), consistent with earlier
23 information regarding the 7 year time frame to obtain a
24 death certificate. Plaintiff requested a judgment declaring
25 Angel deceased after seven and a half years missing.

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1 On August 15, 2012, Plaintiff retained counsel. On
2 August 21, 2012, Plaintiff's counsel's paralegal sent an
3 email to Union Pacific to follow up with an email to Shawna
4 Smith regarding Angel's 401(k) distribution for Plaintiff.
5 On September 11, 2012, Plaintiff's counsel's paralegal
6 emailed Shawna Smith at Union Pacific requesting assistance
7 on receiving policy details as she had a "dilemma with
8 Prudential and MetLife."

9 On September 11, 2012, an Amended Petition for
10 Declaratory Relief was filed on Plaintiff's behalf in Matter
11 of Angel in Idaho state court. In the Amended Petition,
12 Plaintiff named Prudential as a defendant, alleging that
13 Prudential "is an insurance company who issued a life
14 insurance policy on Daniel James Angel."

15 On or about September 17, 2012, Shawna Smith from Union
16 Pacific informed Plaintiff's counsel that Prudential was the
17 life insurance provider. On October 15, 2012, the Idaho
18 state court entered its original Order on the merits in
19 Matter of Angel. On October 23, 2012, the Idaho state court
20 entered an amended order declaring Angel legally dead.

21 On or about October 29, 2012, Ms. Shawna Smith of Union
22 Pacific communicated with Plaintiff's counsel that Union
23 Pacific would accept the Declaratory Judgment in place of
24 the death certificate to process Angel's account.

25 In fall of 2012, Plaintiff submitted her claim to
26 Prudential for the life insurance and accidental death
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1 benefits. On or about October 30, 2012, Plaintiff's counsel
2 obtained Thrift Plan account balance information from Union
3 Pacific. On November 6, 2012, Plaintiff authorized the
4 distribution of Angel's account balance under the Thrift
5 Plan. On November 14, 2012, a copy of the Death Certificate
6 for Angel was forwarded to Ms. Shawna Smith of Union
7 Pacific.

8 On November 14, 2012, Prudential received the
9 beneficiary form, death certificate, sheriff's investigation
10 records, and the obituary of Angel. ECF. No. 48-7 at 5.

11 On November 29, 2012, Prudential informed Plaintiff
12 that it received a Group Life Accidental Insurance Claim.
13 Prudential further indicated that it could not make a
14 determination of the cause of Angel's death because the
15 death certificate state "undetermined." Prudential stated
16 that the file was being transferred to Prudential's Special
17 Investigation Unit and that a determination should be made
18 within thirty (30) days. Id.

19 On December 5, 2012, Prudential made the Basic Life and
20 Optional Life benefits of the policy available to Plaintiff
21 in the amount of \$405,000. Id.

22 On December 6, 2012, Plaintiff's counsel received
23 notice directly from Rebecca Wanner (Senior Client Services
24 Specialist for Prudential in Record Keeping Services) that
25 Prudential had paid Plaintiff Basic Life and Optional Life
26 ///

1 Benefits on December 5, 2012, but that the Accidental Life
2 Insurance Benefits required a more extensive investigation.

3 On or about December 10, 2012, Prudential made the
4 balance of the Basic Life and Optional Life Benefits policy
5 available to Plaintiff in the total sum of \$76,000.

6 On December 26, 2012, Prudential again informed
7 Plaintiff that it could not make a determination of the
8 cause of Angel's death because the death certificate stated
9 "undetermined" and that the file was being transferred to
10 Prudential's Special Investigation Unit and that a
11 determination should be made within thirty (30) days. Id.

12 On January 23, 2013, Prudential once again informed
13 Plaintiff that it could not make a determination of the
14 cause of Angel's death because the death certificate stated
15 "undetermined." Prudential indicated that the file was being
16 transferred to Prudential's Special Investigation Unit and
17 that a determination should be made within thirty (30) days.
18 Id.

19 By letter dated January 31, 2013, Prudential denied
20 that it had to pay the Accidental Death Benefits for Angel
21 in the amount of \$567,000 on the ground that the manner of
22 his death had been ruled undetermined and no proof existed
23 of bodily injury. Id.

24 On February 21, 2013, Union Pacific provided the
25 Summary Plan Description to Plaintiff's counsel, which
26 identified Prudential as the life insurance carrier.
27

1 On February 25, 2013, Plaintiff's counsel advised
2 Prudential in writing that Prudential was, allegedly,
3 unreasonably and intentionally denying payment of
4 Plaintiff's claim. Plaintiff's counsel demanded that the
5 claim be approved for payment by March 1, 2013, and that
6 Prudential pay a portion of Plaintiff's legal fees. Id. On
7 March 8, 2013, Prudential paid the Accidental Life Insurance
8 Benefit in the amount of \$567,000.

9 On March 25, 2013, Plaintiff's counsel wrote to
10 Prudential regarding Ms. Lybecker's dispute with Prudential,
11 and enclosing a draft complaint. The letter stated, in
12 part, that payment of the death benefits and acknowledgment
13 that Plaintiff was entitled to accidental death benefits
14 "does not include attorney's fees nor does it address
15 interest on Ms. Lybecker 's money to which she is clearly
16 entitled." The letter also stated:

17 Ms. Lybecker will file the proposed
18 complaint attached to this
19 correspondence if you do not agree to pay
20 her the sum of \$350,000 in addition to the
21 sums due under the Accidental Death
22 portion of the insurance policy.
23 The sum of \$350,000 is roughly double the
24 amount of interest on the two paid
25 benefits which were due to my client at
26 least by November of 2005 which was one
27 year after the date Mr. Angel disappeared.
28 It is doubled because Prudential likely
earned a rate of return on my clients
money which more than doubled the
rate utilized to calculate the
interest owed . . .

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1 The draft complaint sent to Prudential would have named
2 Prudential as the sole defendant in an action seeking a
3 single, unliquidated sum of money, which amount couldn't be
4 determined. ECF No. 15-16 (The draft complaint asked that
5 Prudential be ordered to pay over either the profits earned
6 by Prudential on the sums wrongfully withheld by Prudential,
7 or the prejudgment interest on the sums wrongfully withheld
8 by Prudential, whichever sum is greater.)

9 On May 20, 2013, before the instant action was filed,
10 Prudential paid Plaintiff an additional amount of
11 \$389,917.97 as an "interest adjustment", which amount was
12 more than \$39,000 higher than the amount Plaintiff had
13 demanded. Prudential paid Plaintiff the full amount of
14 death/accidental death benefits to which Plaintiff deemed
15 herself entitled, plus interest, totaling \$1,437,917.97.

16 On June 18, 2013, Plaintiff brought this action by
17 filing her Complaint in federal court, listing both Union
18 Pacific and Prudential. Plaintiff's Complaint and her First
19 Amended Complaint, however, alleged that Prudential, and
20 Prudential alone, wrongfully delayed payment to her of
21 \$1,048,000 in death benefits ("As the direct and proximate
22 result of Prudential's conduct complained of herein,
23 Prudential retained funds which rightfully belonged to
24 Plaintiff ..."). ECF Nos. 1, 27.

25 On January 16, 2014, Plaintiff filed her written
26 request for an order dismissing Prudential from this action,
27

1 without prejudice and with each party paying its own costs.
2 In support of the motion, it was represented that "...prior
3 to this action, Prudential paid Plaintiff all benefits, with
4 interest, that were owing to her . . ." (ECF No. 40 at 1-2).

5 **II. Plaintiff's Motion for Summary Judgment As to Her**
6 **Requesting Statutory Penalties Against Union Pacific**

7 As limited by her Amended Complaint, Plaintiff seeks a
8 statutory penalty against Union Pacific under ERISA §
9 502(c)(1)(B) based on two allegations: 1) that Plaintiff
10 became a plan participant on June 7, 2004⁴; and 2) that
11 Union Pacific refused Plaintiff's oral request for
12 information regarding the subject plan. (ECF No. 27 at 6.)

13 Plaintiff argues the penalties commenced on the first
14 date that Plaintiff requested the information, which she
15 suggests could be determined at trial. ECF No. 27 at 6,
16 Plaintiff's Amended Complaint. In the next paragraph of the
17 Amended Complaint, Plaintiff alleges that she is entitled to
18 judgment against Union Pacific for the sum of the statutory
19 penalty from the date on which she first orally requested
20 information on the subject plan to February 21, 2013, for a
21 total penalty of \$349,910 (based on the statutory penalty of
22 \$110/day as provided by 29 U.S.C. § 1132(c). Id. at 6-7.

23 Defendant Union Pacific, in its cross-motion and
24 opposition to Plaintiff's summary judgment, asserts that
25 since at least January 16, 2014, Plaintiff has lacked

26
27 ⁴Angel named Lybecker as beneficiary of his life
insurance policy on June 7, 2004. ECF No. 51-2, Ex. E.

1 statutory and Article III standing to pursue this action
2 against Union Pacific. Union Pacific contends that
3 Plaintiff was never a "participant" in the subject plan, as
4 the term "participant" is defined for purposes of ERISA.
5 Further, Union Pacific asserts, Plaintiff was not a
6 "participant" or "beneficiary" (as those terms are
7 defined in ERISA) on June 18, 2013, the date this action was
8 commenced.

9 Defendant states that if Plaintiff called the Union
10 Pacific Service Center in November, 2004, as she claims to
11 have done, Plaintiff would have been told that she was the
12 beneficiary of Angel's Thrift Plan account, even if she did
13 not yet have a death certificate for Angel.⁵ If Plaintiff
14 had inquired about the subject plan, she would have been
15 referred to Prudential, the sole claims administrator of
16 that plan and the sole source of information regarding
17 beneficiaries named by participants in the subject plan,
18 without regard to whether she had a death certificate.⁶

19 Union Pacific's final point of contention is that
20 before June 19, 2013, Plaintiff had received every benefit
21 due to her under the subject plan, with what Plaintiff calls

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25 ⁵Defendant's Statement of Facts Nos. 38-43, 62.

26 ⁶Defendant's Statement of Facts, Nos. 8-9, 11-13, 45-49,
27 62, 65.

1 "fair rate."⁷ On or after June 19, 2013, Plaintiff had no
2 cause of action against former defendant Prudential, the
3 sole claims administrator of the subject plan, and lacked
4 standing to bring any claim against Prudential.⁸

5 **III. Summary Judgment Standard**

6 To withstand a motion for summary judgment, the
7 opposing party must set forth specific facts to show that
8 there is a genuine issue of material fact in dispute.
9 Fed.R.Civ.P. 56(e). A dispute about a material fact is
10 genuine "if the evidence is such that a reasonable jury
11 could return a verdict for the nonmoving party." *Anderson v.*
12 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91
13 L.Ed.2d 202 (1986). All facts in the record and inferences
14 drawn therefrom must be viewed in the light most favorable
15 to the nonmoving party. In the absence of genuine issues of
16 disputed fact, "the moving party is entitled to judgment as
17 a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317,
18 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

19 **IV. DISCUSSION**

20 The parties' cross-motions for summary judgment raise
21 the following two issues: (1) whether Plaintiff has standing
22 to pursue her claims; and (2) whether UPC is subject to a
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24 ⁷Defendant's Statement of Facts Nos. 14-15, 65-66,
25 68-70, 74-75, 76-77.

26 ⁸Defendant's Statement of Facts Nos. 14-15, 66-67, 69,
27 70.

1 penalty under ERISA § 502(c)(1) for its failure to timely
2 produce documents. Each of these issues will be addressed
3 in turn.

4 **A. Ms. Lybecker Does Not Have Standing**

5 To bring an ERISA cause of action for a statutory
6 penalty, a party must have statutory standing. See §
7 1132(a)(1)-(10); *Harris v. Provident Life and Accident Ins.*
8 *Co.*, 26 F.3d 930, 933 (9th Cir. 1994). Under ERISA, only a
9 "participant" or a "beneficiary" is entitled to request plan
10 documents under 29 U.S.C. § 1132(c)(1) and seek penalties
11 for the failure of their production. *Harris*, 26 F.3d at 933.

12 **1. Plaintiff Was Not a Participant in the Subject Plan**

13 Union Pacific asserts that in November 2004, Plaintiff
14 was not a "participant" in the subject plan for purposes of
15 requesting or receiving documents or information under
16 ERISA. ERISA has only one statutory definition of
17 "participant" for use throughout the Act:

18 The term "participant" means any employee
19 or former employee of an employer, or any
20 member or former member of an employee
21 organization, who is or may become
22 eligible to receive a benefit of any type
23 from an employee benefit plan which covers
24 employees of such employer or members of
25 such organization, or whose beneficiaries
26 may be eligible to receive any such
27 benefit.

28 29 U.S.C. § 1002(7).

Plaintiff concedes that she is neither a current nor a
former employee of Union Pacific. The Ninth Circuit case law
has noted that the statutory definition of "participant" is

1 sufficiently clear and only employees can be ERISA
2 "participants." *Harper v. American Chambers Life Ins. Co.*,
3 898 F.2d 1432, 1434 (9th Cir. 1990). Thus, Plaintiff could
4 not have been a participant in the subject plan when any
5 alleged oral requests for information were made.

6 **2. In June 2013, Plaintiff Was Neither a Participant**
7 **Nor a Beneficiary**

8 UPC argues that Plaintiff has no statutory standing to
9 bring this action for a penalty claim against UPC because
10 §1132(a)(1)(A) provides that a civil action may be brought
11 by a participant or beneficiary only, as determined when the
12 action is brought. Subsection 1132(c)(1)(B) is the only
13 provision that confers authority for a penalty based on a
14 failure to supply documents following a request (specifically
15 a written request) by a participant (or by a beneficiary if
16 the beneficiary is in pay status).

17 A plaintiff cannot meet either statutory definition
18 unless the plaintiff "is or may become eligible to receive a
19 benefit" under the plan in issue. 29 U.S.C. § 1002(7), (8).
20 However, at the pleading stage, a plaintiff who alleges a
21 "colorable claim" of entitlement to a plan benefit is
22 treated (at least provisionally) as satisfying the
23 applicable definition for purposes of the standing
24 requirement under Section 1132(a). *Firestone Tire and*
25 *Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989).

26 Union Pacific asserts that at the beginning of this
27 case, Plaintiff relied on her claim against Prudential as

1 the source of her "participant" status asserting that she
2 had a "colorable claim" to life insurance plan benefits
3 because she was entitled to "the greater of the profits
4 Prudential earned on her money or interest on that money."
5 This prayer for relief standing alone is not sufficient to
6 satisfy the definition of "participant" or "beneficiary"
7 under the colorable claim test because such claim must be
8 for a benefit (and not solely interest or penalty) under the
9 plan. Before June 18, 2013, Plaintiff had received every
10 benefit due to her under the subject plan, with what
11 Plaintiff calls "fair rate" for interest on the money
12 Prudential earned on that benefit paid fully but not timely.

13 Plaintiff does not dispute that the Ninth Circuit has
14 never held that payment of interest is a "benefit" for
15 purposes of statutory standing analysis under Section
16 1132(a)(1). The Court finds no case law to support the view
17 that interest is considered a "benefit" in the ERISA sense
18 of the word. When this action commenced, Plaintiff did not
19 have any claim to any further payments from Prudential. The
20 record shows that any claim Plaintiff may once have had
21 against Prudential was extinguished in May 2013, before
22 Prudential's dismissal and before this action was commenced.
23 See "Order Re Motion to Dismiss Defendant Prudential," ECF
24 No. 44.

25 In conclusion, the Court finds that only a colorable
26 claim to an additional plan benefit might have supported a
27

1 finding of Plaintiff's status as a "participant" or
2 "beneficiary" for purposes of ERISA's exclusive
3 jurisdictional provisions in Section 1132(a)(1)-(3). It
4 follows that Plaintiff lacks standing. Union Pacific is
5 entitled to judgment as a matter of law dismissing
6 Plaintiff's claim. See 29 U.S.C. §1132(a)(1)(A).

7 **3. Written Request Never Made by Plaintiff**

8 Even if Plaintiff were a participant or beneficiary at
9 the time of the commencement of the action, which the Court
10 finds she was not, Plaintiff failed to make a written
11 request for documents.

12 Plaintiff seeks a statutory penalty against Union
13 Pacific only for an alleged failure to satisfy the
14 requirements of 29 U.S.C. § 1132(c)(1)(B), and based on two
15 oral requests allegedly made by Plaintiff to Union Pacific
16 in 2004. One relevant statute, 29 U.S.C. § 1132(c)(1)(B),
17 reads:

18 (c) Administrator's refusal to supply
19 requested information; penalty for failure
20 to provide annual report in complete form
21 (1) Any administrator (B) who fails
22 or refuses to comply with a
23 request for any information which
24 such administrator is required by
25 this subchapter to furnish to a
26 participant or beneficiary (unless
27 such failure or refusal results
28 from matters reasonably beyond the
control of the administrator) by
mailing the material requested to
the last known address of the
requesting participant or
beneficiary within 30 days after
such request may in the court's
discretion be personally liable to

such participant or beneficiary in the amount of up to \$100 a day⁹ from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Another relevant statute, 29 U.S.C. §1025(a) sets forth the writing requirement for participants (which Lybecker was not) and beneficiaries:

(a) Requirements to provide pension benefit statements

(1) Requirements

(A) Individual account plan

The administrator of an individual account plan (other than a one-participant retirement plan described in section 1021(i)(8)(B) of this title) **shall** furnish a pension benefit statement--

(i) at least once each calendar quarter to a participant or beneficiary who has the right to direct the investment of assets in his or her account under the plan,

(ii) at least once each calendar year to a participant or beneficiary who has his or her own account under the plan but does not have the right to direct the investment of assets in that account, **and**

(iii) **upon written request** to a plan beneficiary not described in clause (i) or (ii).

29 U.S.C. § 1025(a) [emphasis added.]

Plaintiff concedes that she did not make written request for the information. However, Lybecker argues she made oral request for the information and because she became a plan "participant" as of June 7, 2004 (when Angel named
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⁹See 29 C.F.R. § 2575.502c-1 (increasing the per diem penalty from \$100 to \$110).

1 her a beneficiary of the subject plan), she was not required
2 to make a written request for information. ECF No. 15 at 3.

3 Union Pacific argues that the duty to provide documents
4 within 30 days of a participant's or beneficiary's request
5 does not arise under §1132(c)(1)(B) except under specified
6 circumstances. See § 1132(c)(1)(B). One of those specified
7 circumstances is that the plan administrator has failed to
8 provide documents or information within 30 days of receipt
9 of a written request for the documents or information. *Id.*

10 The Court finds that the reasoning set forth in
11 *Porcellini v. Strassheim Printing Co., Inc.*, 578 F.Supp. 605
12 (E.D.Pa.1983) and *Anderson v. Mortell*, 722 F.Supp. 462
13 (N.D.Ill.1989), is sound and directly applicable to the
14 present action, since, in her amended complaint, Plaintiff
15 asks the court to impose the statutory penalty in § 1132(c)
16 against Union Pacific for technical violations of ERISA. The
17 Court agrees with Union Pacific's position that § 1132(c) is
18 inapplicable because Lybecker failed to comply with the
19 statute's requirement that requests for such information be
20 made *in writing* and directed to the *plan administrator*.
21 *Porcellini*, 578 F.Supp. at 611. Union Pacific did not
22 receive the requests in writing and Prudential (not Union
23 Pacific), was the plan administrator of the subject plan
24 involved.

25 The court declines to tinker with ERISA's complex
26 regulatory scheme. ERISA has been referred to as a
27

1 "comprehensive and reticulate" legislative scheme designed
2 to promote the integrity of this country's private pension
3 plans and to protect the vested expectations of plan
4 participants and beneficiaries. *See Nachman Corp. v. Pension*
5 *Benefit Guaranty Corp.*, 446 U.S. 359, 100 S.Ct. 1723, 64
6 L.Ed.2d 354 (1980); *see also Pompano v. Michael Schiavone &*
7 *Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982), *cert. denied*,
8 459 U.S. 1039, 103 S.Ct. 454, 74 L.Ed.2d 607 (1982)
9 ("ERISA's purpose is to secure guaranteed pension payments
10 to participants by insuring the honest administration of
11 financially sound plans."). By adopting § 1025(a) Congress
12 has clearly manifested an intent to make plan participants
13 or beneficiaries make requests in writing. Thus, the court
14 construes the language of § 1025(a) to give effect to
15 legislative intent.¹⁰

16 **B. Statutory Penalty Will Not Be Imposed on UPC**

17 ERISA contains a disclosure provision that requires a
18 plan administrator to, "upon written request of any
19 participant or beneficiary, furnish a copy of the latest
20 updated summary plan description, and the latest annual
21 report, any terminal report, the bargaining agreement, trust
22 agreement, contract, or other instruments under which the
23

24
25 ¹⁰See H.R.Rep. No. 533, 93d Cong., 1st Sess. 12 (1973),
26 reprinted in 1974 U.S.Code Cong. & Admin. News 4639, 5042.
27 Furthermore, the use of the word "shall" is mandatory in
28 statutory construction in the absence of any contrary
intention expressed in the statute. C. Sands and N. Singer,
2A Sutherland Stat. Const. § 57.03 at 643-44 (4th ed. 1984).

1 plan is established or operated." 29 U.S.C. § 1024(b)(4).
2 Section 1132(c)(1)(B) gives teeth to this disclosure
3 obligation, rendering a noncompliant administrator liable
4 for up to \$110 per day for failing to produce requested plan
5 documents within 30 days of the request. *Mondry v. Am.*
6 *Family Mut. Ins.*, 557 F.3d 781, 793 (7th Cir.2009); 29
7 C.F.R. § 2570.502c-1. A penalty is not mandatory, and the
8 amount, if any, is left to the court's discretion. *Fenster*
9 *v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 858 (7th Cir.2002).

10 To trigger this discretionary power to impose
11 penalties, a beneficiary must establish that the plan
12 administrator "was required to make available the requested
13 information, that the [beneficiary] requested the
14 information, and that the administrator failed to provide
15 the information." *Kleinhans v. Lisle Sav. Profit Sharing*
16 *Trust*, 810 F.2d 618, 622 (7th Cir.1987).

17 The Court found above that Plaintiff did not have a
18 colorable claim to have supported finding that Plaintiff was
19 a "participant" or "beneficiary" for purposes of ERISA's
20 exclusive jurisdictional provisions in §1132(a)(1)-(3).
21 Having found that Ms. Lybecker is not a participant or
22 beneficiary of the Plan, she lacks standing to bring this
23 claim under § 1132. See *Crotty v. Cook*, 121 F.3d 541, 544
24 (9th Cir.1997).

25 Even if this Court had found that Plaintiff did have
26 standing, based on the unique facts associated with this
27

1 case, any untimely production of plan documents was
2 complicated by the fact that Ms. Lybecker unreasonably
3 relied on information provided by law enforcement that she
4 could not obtain Angel's death certificate for 7 ½ years.
5 See ECF No. 48-6, Ex. F at 2, Petition. Therefore, a viable
6 argument could be made that the statutory penalty under §
7 1132(c)(1) would not apply as such delay by the plan
8 administrator (Prudential not Union Pacific) had causes
9 other than the result of bad faith. Finally, in determining
10 whether to impose a statutory penalty, the Court would look
11 at the significance of any prejudice and harm to Plaintiff
12 from a plan administrator's failure to timely produce the
13 plan documents. Plaintiff received more than she requested
14 from Prudential, who was voluntarily dismissed without
15 prejudice from this case.

16 **V. Conclusion**

17 Plaintiff cannot satisfy requirements of
18 §1132(a)(1)A) and as such cannot trigger the Court's
19 §1132(c) "penalty power." Thus, Article III's
20 "redressability" requirement is not satisfied in Plaintiff's
21 claim against Union Pacific. It follows that Plaintiff
22 cannot establish Article III standing to pursue her claim
23 against Union Pacific. Accordingly,

24 **IT IS ORDERED** that:

25 1. Defendant Union Pacific's Motion For Summary
26 Judgment, **ECF No. 46**, filed on October 15, 2014, is **GRANTED**.

1 Plaintiff's claim(s) are dismissed against Defendant Union
2 Pacific with prejudice.

3 2. Plaintiff's Motion For Summary Judgment, **ECF No. 50**,
4 filed October 15, 2014, is **DENIED**.

5 **IT IS SO ORDERED.** The District Court Executive is
6 directed to enter this Order; enter judgment consistent with
7 this order; and **CLOSE FILE**.

8 **DATED** this 12th day of January, 2015.

9
10 ***s/Lonny R. Suko***

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LONNY R. SUKO
13 SENIOR UNITED STATES DISTRICT JUDGE
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